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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANDREW JACOB QUINTERO, Defendant and Appellant.	F061696 (Super. Ct. No. F09904481) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Catherine Chatman, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

A jury found appellant Andrew Jacob Quintero guilty of inflicting corporal injury resulting in a traumatic condition on the mother of his child (Pen. Code,[1] § 273.5, subd. (a); count 1), battery with serious bodily injury (§ 243, subd. (d); count 2), assault with a deadly weapon (a knife) (§ 245, subd. (a)(1); count 3), torture (§ 206; count 4), and criminal threats (§ 422; count 5). The jury also found true that appellant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) in the commission of count 1, and personally used a deadly weapon (a knife) (§ 12022, subd. (b)(1)) in the commission of count 5. Appellant admitted that he suffered a prior conviction for fleeing a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)), for which he served a prison term within the meaning of section 667.5, subdivision (b). Appellant received an indeterminate term of life in prison with the possibility of parole for the torture offense. The terms for his other offenses and enhancements were either stayed or ordered to run concurrently with the indeterminate life term.

On appeal, appellant contends: (1) the trial court erred by precluding the defense investigator from testifying as an expert on the amount of force necessary to break a rib; and (2) the trial court erred by failing to instruct, sua sponte, on attempted torture as a lesser included offense of torture. We conclude that any error in excluding the expert testimony was harmless because, contrary to appellant's contention, the proposed testimony did not directly refute or discredit the testimony of the nurse who examined the victim and opined that a lot of force was required to cause the rib injuries she suffered. We further conclude that the court's failure to instruct on attempted torture was invited error because the record clearly demonstrates that appellant's defense counsel chose to omit the instruction for tactical reasons. Accordingly, we affirm the judgment.

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1 Further statutory references are to the Penal Code unless otherwise specified.

FACTS

On the afternoon of July 28, 2009, appellant went to the house of Cindy Garcia, his former girlfriend and mother of two of his children, a boy and baby girl. Garcia testified that she was in the bathroom, taking a bath, when she heard a loud bang on her bathroom door and then appellant's voice telling her to open the door.

The bathroom door was locked, but appellant was able to open it and walked in. Garcia told appellant to leave. Appellant said no and started taking his clothes off. Appellant asked Garcia to have sex with him. Although she said no, they started having sex.

Appellant "got off real quick" when he noticed "hickeys" on Garcia's body. He became angry, told her to get dressed, and questioned her about the hickeys. While they were still in the bathroom, appellant "sock[ed]" Garcia on the side of her face near her eye.

Appellant then grabbed Garcia by her hair and dragged her to her bedroom. Her children were asleep on a futon mattress in the corner of the bedroom. Appellant started closing all the windows in the bedroom, while telling Garcia "how he should beat [her] ass and calling [her] a bitch and a [whore]."

As Garcia was sitting on the bed, appellant came up and "socked" her in the side of the face with a closed fist. The blow caused Garcia to fall backwards off the bed. As Garcia was lying on her back, appellant "just lost it." He started hitting her with his fists and said he was going to kill her. Appellant hit Garcia's arms when she put her hands up in front of her to try to block appellant's blows.

Appellant then lifted Garcia up by one of her arms and hit her "hard" in the side. Garcia heard one of her ribs break and began to have trouble breathing. Appellant stopped and asked, "Was he worth it? Was he worth it?" Appellant then lifted Garcia up by the arm again and hit her two more times in the side. Garcia heard another rib break.

Appellant demanded that Garcia give him her new boyfriend's telephone number. Garcia gave him the number and appellant called it. Garcia heard appellant talking to her boyfriend's sister. He said something like, "You better tell him to come and get her because she's going to die" and "I fucked her up. I beat her ass."

Garcia asked appellant to call the ambulance. Appellant accused Garcia of "over-exaggerating" and told her to get their son's stuff together. Appellant tried to pick Garcia up by her arm, but she threw herself back down on a pile of clothes.

While Garcia was lying on the pile of clothes, appellant took "a wizard knife" from off the entertainment center. He pulled the blade out and said, "I'm going to cut your pussy."

Garcia packed their son's bag and appellant left with the boy. After appellant left, Garcia's other son helped her walk to a neighbor's house. The neighbor called the police.

Around 3:00 p.m., Fresno County Sheriff's Deputy Jose Diaz responded to the call regarding a domestic disturbance. When he arrived, emergency personnel were tending to Garcia. Garcia was sitting on the ground. She appeared scared. She was crying and having trouble breathing.

Garcia told Deputy Diaz that her boyfriend and father of her children had assaulted her and described the assault to him. Garcia said that after appellant brought her into the bedroom, he sat her down on the bed and hit her with a full bag of clothing. He then demanded that she tell him who gave her the hickeys.

When Garcia told appellant the name of her new boyfriend (i.e., "Andrew"), appellant thought she was being sarcastic because this was also appellant's name. Appellant punched Garcia in the left side of her face with a closed fist, causing her to fall off the bed onto the ground.

After Garcia fell onto the ground, appellant "picked her up and proceeded to punch her several more times on the left side of her body or the left flank of her torso." After punching her in the flank, appellant "proceeded to stomp her upper torso, or chest,

approximately eight to ten times" and "to kick her on the upper torso numerous times" while she was lying on her back.[2] Finally, appellant sat on Garcia's chest and started choking her with his right hand. Appellant only stopped when Garcia's youngest son ran into the room.

Garcia also told Deputy Diaz about appellant's threats to kill her and cause injury to her vaginal area. Garcia reported that she feared for her life and believed appellant was capable of carrying out his threats.[3] Garcia explained that this was not the first time she had been a victim of domestic violence. She told Deputy Diaz that appellant had abused her on approximately 10 prior occasions, but she never reported the abuse because she was afraid of appellant.

Dr. Suneil Agrawal was the emergency room physician who treated Garcia after the incident. Garcia told Dr. Agrawal that appellant assaulted her for a period of approximately 30 minutes, and said he tried to choke her, pulled her hair, knocked her down, and kicked and punched her. Dr. Agrawal opined that Garcia's injuries were consistent with the attack she described.

Dr. Agrawal observed that Garcia had bruising on her arm, chest, and left flank. She also had a large area of swelling (hematoma) above her left eye. A computed tomography (CT) scan revealed fractures in two ribs, a laceration to the left kidney, and a pneumothorax. Dr. Agrawal explained that a pneumothorax involves a penetrating injury to the body cavity, so that air escapes inside and the lung deflates. He treated the pneumothorax by inserting a chest tube. Dr. Agrawal opined that the pneumothorax was

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2 At trial, Garcia denied that appellant stomped on her chest despite her prior statements and preliminary hearing testimony to the contrary.

3 Garcia testified at trial that she had not been truthful with Deputy Diaz, and she had not really believed appellant would carry out his threats against her.

most likely caused by the rib fractures and the laceration to the kidney could have been caused by blunt trauma.

On cross-examination, Dr. Agrawal testified that Garcia's injuries were not consistent with a single fall against a hard object. He explained:

> "One, the hematoma above her left eye was towards her front, while the injuries in her thorax area were on her back mostly, which wouldn't be consistent with one fall. Number two, she had mentioned that she was choked. And there were several spots on her neck that had developed that were consistent with what we had seen with fingerprints or hands at least."

Defense counsel questioned Dr. Agrawal further:

> "Q. The rib injury by itself, could you get a rib injury like that from falling into a hard object?
>
> "A. Not very easily.
>
> "Q. Why not?
>
> "A. I don't—it takes quite a bit of force to break a rib or even two ribs. And falling on to a hard space just from ground, I don't know that I've ever seen that that I can recall. In a patient who is younger and not osteopenic, meaning they have low bone density such as an elderly patient.
>
> "Q. You say it takes quite a bit of force to break a rib?
>
> "A. It can.
>
> "Q. Have you known of people to break ribs in relatively low impact sports such as golf or rowing a boat?
>
> "A. Yes. I've read about those cases. I don't think I've seen that myself.
>
> "Q. Have you ever known of people to break a rib by coughing?
>
> "A. I've seen that in one or two patients. And they have been cancer patients."

Defense counsel also presented Dr. Agrawal with a hypothetical: "If someone jumped on my back and I threw them off my back and they landed up against a hard object such as a wall heater, could that possibly break a rib?" The doctor responded:

> "I mean, I don't know the body mass of the person. I don't know their past medical history. I don't know what they hit from how far, what force is generated, how strong the person is on the ground. I suppose it would be possible, but I would think it's unlikely."

On redirect examination, Dr. Agrawal testified that he saw nothing in Garcia's records or in examining her that would indicate the 28-year-old had any deficiencies in her bone structure anatomy.

Laura Woods, a registered nurse and sexual assault forensic examiner, examined Garcia on July 30, 2009. Woods observed that Garcia had multiple bruises on her arms and legs, her neck, around her eyes, and on the left side of her back near the top of her ribs. Woods opined that the circular pattern marks she found on Garcia's neck corroborated Garcia's statements that appellant choked her.

Woods also observed that Garcia had fractured ribs and a chest tube in place to treat the pneumothorax she sustained "from a blunt force injury to the area of her ribs." On direct examination, the prosecutor questioned Woods about the amount of force necessary to cause Garcia's injuries:

> "Q. Do you know how much force it takes to cause those injuries?
>
> "A. To fracture ribs and cause a pneumothorax takes a pretty good blow.
>
> "Q. What are the kinds of things that in your experience have caused that kind of force?
>
> "A. In my experience with patients—in the emergency department I had a young man who was in an ATV accident, all terrain vehicle accident. I had a gentleman that was pinned under a car. The car somehow fell from the back and landed on him and he took a blow to the ribs.

"Q. Would it be fair to say it takes a lot of force to cause those injuries?

"A. Yes, that would be fair to say.

"Q. Would those injuries be consistent from a fall from a bed to the floor?

"A. Doubtful unless she landed on an object that made the floor not a flat surface.

"Q. What would be the kind of objects you'd be looking for?

"A. Something hard. Something large that she would have landed on.

"Q. Would there still have to be an application of force involved?

"A. Yes. Yes. Blunt force."

On cross-examination, Woods acknowledged that rib injuries like Garcia's "could be" sustained as a result of the victim jumping on top of someone and then being tossed off and landing on a heater in the corner of the room.

The prosecution also called Bob Meade, a licensed marriage and family therapist, as an expert on domestic violence. Meade testified generally about common behaviors of domestic violence victims. Meade explained that victims often feel guilty after calling law enforcement and recant their reports of abuse, even when they have suffered serious injuries like broken bones.

Defense

Appellant testified that he went to Garcia's house on July 28, 2009, to pick up his son and the rest of his belongings and that he had a key to the house. According to appellant, Garcia was the one who started the physical altercation. She jumped on his back three times to prevent him from leaving and each time he threw her off. One of the times he threw her off, appellant saw Garcia hit the wall where the heater was located, so she could have hit the heater.

Appellant denied that he threatened to kill Garcia or that he engaged in the assaultive behaviors she described in her trial testimony and to law enforcement and medical personnel at the time of the incident. Appellant also denied that he displayed the blade of his knife or threatened to cut Garcia with it.

Appellant testified that he had seen Garcia inflict injuries upon herself in the past. Every time he would try to leave her, she would hit her face and scratch her arms. When he asked her why, she would say, "because I can't beat you up so I'm going to do it to myself." Appellant also testified that Garcia often faked injuries after they would fight.

Mary Ruth Quintero, one of appellant's sisters, testified that, about a week after the incident, Garcia asked her to take care of her kids. Garcia told her "she might go to prison because of what she said that wasn't true." On cross-examination, Mary Ruth[4] testified that Garcia told her that appellant did not break her ribs, rape her, or anything like that. Garcia told Mary Ruth that, when she was telling appellant not to leave, he pushed her and she fell against something, possibly the heater or a box of toys that was there.

Miranda Quintero, another sister of appellant, testified that, once in 2007, she walked into the bathroom and saw Garcia hitting herself in the face with a brush. When Miranda yelled and asked what she was doing, Garcia said she and appellant had been arguing and that she was going to blame it on appellant.

Defense investigator Mryl Stebens testified that Garcia contacted the defense in December 2009, and he arranged to conduct a telephone interview with her, which he recorded with Garcia's consent. A recording of the interview was played for the jury.

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4 Some of the individuals are referred to by their first names because they share a last name with others involved. This is done for clarity and convenience. No disrespect is intended.

In the interview, Garcia told Stebens that she had exaggerated or fabricated a number of the details in her previous statements to law enforcement regarding the incident on July 28, 2009. Garcia told Stebens that after she and appellant had consensual sex and he saw her hickeys, they "started arguing back and forth." While appellant was gathering up his possessions, Garcia grabbed his bag and then grabbed appellant's arms and shoulders to keep him from leaving. Appellant threw her off and she hit "the corner of the heater, pretty hard." Garcia thought this was "probably how [she] punctured [her] lung."

DISCUSSION

I. Exclusion of Expert Witness Testimony

Appellant contends the trial court abused its discretion, and denied him his federal constitutional right to present a meaningful defense, by precluding Stebens from testifying as an expert on the amount of force necessary to break a rib. Appellant claims the court erroneously concluded that Stebens was unqualified to render an opinion on the subject because he lacked sufficient medical expertise.[5] Appellant asserts that Stebens's testimony at the Evidence Code section 402 hearing "disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury." Appellant highlights the defense investigator's testimony confirming that, in his extensive military and law enforcement experience, at least "100 times [he had] broken a bone or been involved in a situation

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[5] Appellant also contends the trial court erroneously found that the defense's mid-trial request to designate and call Stebens as an expert constituted a discovery violation under section 1054.3, and, even if a violation occurred, the circumstances did not justify imposition of a preclusion sanction. Although the court did find a violation of section 1054.3, it did not indicate it was precluding Stebens from testifying as an expert as a sanction for the violation. Rather, the court's comments indicate its ruling was based primarily on the court's finding that Stebens did not qualify as an expert. Thus, the court observed: "[A]lthough Mr. Stebens ... may have considerable experience in a lot of subject matters by virtue of his law enforcement training and experience it does not qualify him as an expert to testify about what is in effect a medical matter. So even if you had designated him two months ago, I would not allow him to testify for the reasons that I've just mention[ed] on this subject."

where a bone has been broken." Assuming, without deciding, the trial court erred in finding Stebens unqualified to render an expert opinion on the amount of force necessary to break a rib, and appellant did not waive his constitutional claim by failing to raise it below, we conclude reversal is not required because the exclusion of Stebens's testimony did not prejudice appellant.

According to appellant, if the trial court had permitted Stebens to testify as an expert, he would have testified, as a general matter, "that various factors, not simply the force, contributed to broken ribs, such as the person's size, weight, fragility, the hardness of the striking object, its nature to apply force per area, the body's position, [and] the trajectory and angle." Appellant argues that such testimony would have "contradicted Nurse Woods'[s] facile testimony that a lot of force from a pretty good blow caused the [victim's] injuries."

Appellant apparently bases his understanding of Stebens's proposed testimony on the witness's answers to questions posed by the prosecutor and the trial court during the Evidence Code section 402 hearing. The prosecutor questioned Stebens, in relevant part, as follows:

> "Q. Have you ever seen anybody have a broken rib from being punched?
>
> "A. Yes.
>
> "Q. And did you know how much force was required from that punch to break the rib?
>
> "A. There's two answers to that if you would allow me. I have interviewed and seen people that have had broken ribs from subsequent contact. And I've inflicted such damage.
>
> "Q. Do you know why?
>
> "A. Why what?
>
> "Q. The rib breaks and how much force is applied?

"A. It really depends upon the trajectory, the angle and the force of the -- of the assailant, which is this case I'm talking about myself as I applied the force. The amount of force varies depending upon the position of the body, whether it's the front or the back portion of the rib. It breaks in various patterns. Angle has a lot to do with it. If you hit it straight on you might have more of a spring effect versus a downward and upward thrust could not give that spring or absorbing factor."

The court questioned Stebens, in relevant part, as follows:

"THE COURT: Okay. I have one question that I need to ask you, Mr. Stebens. As I understand it here from [defense counsel] a moment ago he would propose to have you testify about the amount of force it might take to break the rib of somebody in the position, essentially, of Cindy Garcia in this case, meaning her size and the rest of that. What particular experience or training do you have that would allow you to express an opinion on that particular subject?

"THE WITNESS: Well, Your Honor, the only thing I can offer is based upon my training and experience and teaching is that force by and in itself is not always the necessary—it depends on the soft tissue. It depends on the weight of the individual, the hardness of the object they hit or are being hit with i.e., a baseball fast versus a fist—in this case maybe a heater, being stomped by the heel of the foot or toe of the foot or elbow. That's a contributing factor that has to be taken into consideration when force trauma is applied. All the things that have to be taken into consideration are the—well, as the individual herself stated, she's fragile; not knowing how big she is as to what the strike point was; whether it was a pointed object; PSI, pounds per square inch has something to come into it versus—a railing versus a heal of a foot, or the toe of a shoe versus a flat railing. Those—they would absorb a lot more force versus a toe coming in would have more force applied to it in a focused area. So that's really about all I can offer as far as this particular case."

Assuming, based on the forgoing, that appellant is correct in asserting that Stebens would have testified that "various factors, not simply the force, contributed to broken ribs," there is no possibility the trial court's ruling excluding this testimony was prejudicial, whether harmless error is judged under the state standard for erroneous evidentiary rulings, which we believe applicable here (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Watson* (1956) 46 Cal.2d 818, 836), or the elevated

standard that would be required if the ruling had completely prevented appellant from establishing a defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 691; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)).

Stebens's proposed testimony did not directly refute and would have done little to discredit Woods's testimony regarding Garcia's injuries. The nurse's opinion that it would have taken "a good blow" or "a lot of force" was elicited in direct response to a question about the amount of force it would take to cause the victim's injuries. Contrary to appellant's suggestion, her opinion did not necessarily imply that force was the *only* factor that could have contributed to the victim's ribs breaking, or that other factors—such as the victim's size, the hardness of the striking object, or the angle at which the victim was struck—were not contributing factors. Indeed, Woods went on to testify that Garcia's injuries could also be consistent with a fall, if she landed on a hard or large object. And, during cross-examination, Woods acknowledged that it was plausible that Garcia could have sustained the injuries to her ribs if she fell against a heater as described by defense counsel.

Moreover, Dr. Agrawal's testimony on cross-examination essentially conveyed that various factors—such as "the body mass of the person" and "what they hit from how far"—would need to be taken into consideration to render an opinion on whether a victim could sustain rib injuries under the scenario presented by the defense. On this record, it is not reasonably probable that a result more favorable to appellant would have been achieved if the court had not excluded Stebens's proposed expert testimony that various factors, not simply the force, could contribute to broken ribs. (See *People v. Rangel* (1992) 11 Cal.App.4th 291, 303 [finding harmless error under more stringent *Chapman* standard "where the essence of the stri[c]ken testimony" was elicited through other means].)

II. Failure to Instruct on Attempted Torture

Appellant contends the trial court erred when it failed to instruct, sua sponte, on attempted torture as a lesser included offense of torture. Respondent contends the failure to instruct was invited error, and appellant's claim is barred on appeal. We agree with respondent.

The trial court is under a sua sponte duty to instruct on lesser included offenses whenever the "evidence is substantial enough to merit consideration by the jury." (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) This sua sponte duty exists even if the lesser offense is inconsistent with the theory of defense elected by the defendant, or the defendant specifically requests that the jury not be instructed on lesser included offenses. (*Id*. at pp. 195-196.)

However, a defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades the court to not instruct on a lesser-included offense supported by the evidence. (*Barton*, *supra*, 12 Cal.4th at p. 198.) "In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*Ibid*.)

During a discussion regarding jury instructions, the following exchange took place:

> "THE COURT: … I asked you to take a look, as I said, to that [*People v. Hamlin* (2009) 170 Cal.App.4th 1412 (*Hamlin*)] case …. Because there is a disc[u]ssion in that case about, among other things about lessers of torture and, in particular, the circumstances which might allow for a lesser of an attempted torture. And it just seems to me that given the elements of torture that there certainly—that the defendant inflicted great bodily injury on someone is evidence which seems to me in the context of what's occurred here is supported by the testimony.
>
> "The second element of torture, of course, is that when the injury was inflicted that the defendant had a certain intent. So I suppose in the context of the *Hamlin* case that an attempted torture would be a situation in

which the defendant had such an intent but, in fact, did not inflict great bodily injury. And so for that reason—I suppose the question, then, is is there some theory in the evidence as you see it of an attempted torture in this case.

"And, [defense counsel], first of all, have you had [a] chance to take a look at the case on that?

"[DEFENSE COUNSEL]: I have had a chance to look at the case, Your Honor.

"THE COURT: In your view any theory for giving a lesser of attempted torture?

"[DEFENSE COUNSEL]: I do not believe so.

"THE COURT: What about the People?

"[THE PROSECUTOR]: No, Your Honor. I believe that *Hamlin* would actually support not giving an attempted torture instruction in this case based on the facts and the evidence that's come forward.

"THE COURT: I think what's fundamentally missing here from the point of view of—well, I'm not going to go any further. You know, I think I've said enough. I asked you to take a look at the case. You are both satisfied. I take it you are both satisfied that independent of there being any evidence for it neither of you want to argue for an attempted torture as a lesser for tactical reasons. [Defense counsel], is that true as well?

"[DEFENSE COUNSEL]: That is true, Your Honor.

"THE COURT: You want to maintain credibility with this jury. And I take it the defense's position on this case is … there's no torture here at all.

"[DEFENSE COUNSEL]: That is correct, Your Honor.

"THE COURT: You are satisfied for that tactical reason for an all or nothing approach and so are the People?

"[THE PROSECUTOR]: Yes.

"[DEFENSE COUNSEL]: Absolutely.

"THE COURT: Great. Then I'm satisfied as well that the giving of any lesser or attempt is waived."

For the invited error doctrine to be applicable, "the record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice. A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Here, the failure to give an instruction on attempted torture is invited error. The record shows that appellant's defense counsel chose to omit the instruction based on an all-or-nothing tactical strategy. As a result, appellant's claim that the court erred in failing to instruct the jury on attempted torture is waived as invited error.

Appellant claims defense counsel did not invite error but "acquiesced to the trial judge's errant reading of *Hamlin* out of ignorance and/or mistake."[6] Appellant's claim is unpersuasive because the record indicates defense counsel would have waived attempted torture instructions for tactical reasons even if he thought the evidence supported giving such instructions under *Hamlin*. Thus, counsel agreed with the court's statement, "I take it you are both satisfied that *independent of there being any evidence for it* neither of you want to argue for an attempted torture as a lesser for tactical reasons." (Italics added.)

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6 According to appellant, the court "misread [*Hamlin*] for the proposition that a lesser included offense of attempted torture was limited to the situation when defendant had the required intent, but the evidence raised a reasonable doubt whether or not he inflicted great bodily injury."

DISPOSITION

The judgment is affirmed.

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HILL, P. J.

WE CONCUR:

_____
WISEMAN, J.

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KANE, J.